issue to the functionality of the trade dress that was copied.

D. THE FEDERAL CIRCUIT DID NOT QUESTION THE SUFFICIENCY OF THE EVIDENCE OF RETAILER SOURCE CONFUSION, ONLY ITS LEGAL SIGNIFICANCE

As they did during closing argument at trial, Respondents devote considerable energy to arguing about the "credibility" and weight of testimony showing source confusion by three separate Home Depot employees, a DFG employee, and an independent sales representative who sold seasonal products manufactured by DFG and others. (AP04793-95; 4906-07; 4911-12; 4841-42; 4637-46) But as the district court's opinion states, "it is the jury's job to resolve issues of reliability and conflicts in testimony." (App. 25a.) The Federal Circuit's decision does not – and, again, could not – disagree. (*See* App. 12a.) The Federal Circuit disregarded this evidence based on its legal conclusion that retailer source confusion is not probative of secondary meaning. For the reasons stated in DFG's opening brief, this conclusion contradicts Ninth Circuit authority and the letter and spirit of the Lanham Act. This Court should therefore grant *certiorari* to review and clarify this important issue.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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